NEPA TASK FORCE COMMENTS

Comments on NEPA Draft Report to the NEPA Task Force, House Committee on Resources, by Professor Oliver A Houck, Tulane Law School, New Orleans, Louisiana, January 4. 2006

By way of background, I am a Professor of Law at Tulane University in New Orleans, Louisiana, and direct its environmental law program. I have taught, researched, litigated and participated in NEPA implementation since its enactment in 1969. I have published several law review articles on the program, and have presented lectures and courses on environmental impact review in nearly a dozen countries abroad. I have followed the House Resources Committee proceedings in Washington DC and in field hearings, and assisted in the preparation of detailed comments of more than 200 law professors to the House Committee on Resources in October, 2005. I also authored an article on these proceedings in the December issue of the Environmental Law Reporter.

I would like to thank and compliment the Committee for the inclusive nature of these proceedings. NEPA requires no less. It is, far and away, the most important program in America (indeed, the world) seeking to reconcile human development with a sustainable environment. I also appreciate the notice-and-comment nature of these proceedings, in which the Committee presents its concerns and proposals for public response.

This said, this same notice-and–comment process and the level of detail presented by the Committee in its recommendations reveals the essentially regulatory nature of the proposals. There is not a single recommendation made in the Report that could not be accomplished more directly by regulation of the Council on Environmental Quality and other federal agencies. Not one. The considerable advantage of proceeding by regulation is adaptive management, the ability to adjust and fine-tune as the new requirements evolve. This adaptability is essential for a program as wide ranging as this one. My first recommendation, then, is that the Committee re-examine what is truly “Presidential” here, requiring a legislative fix, and that which can be accommodated in a less restrictive way. If the Committee were to secure the objectives it seeks through regulation, it would have no less wisely invested its time. Indeed, it would have invested it more wisely.

As a corollary, I do not agree – and I think no serious student of this program would agree – that the rationale for legislative action today can be fairly compared, as the Report does, to the exigencies that prompted NEPA in 1969. A brief review of the Senate report on the bill shows the urgency demonstrated and felt by members of Congress at that time. For which there was no legislation at all. To equate those urgencies with the complaints of a relatively few (and certainly not all) affected sectors today over NEPA compliance is to trivialize the statute. Giving birth is just not the same as getting a haircut.

Also as a corollary, I do agree – and I think all agree – that we should continually seek to make the NEPA process more targeted and more effective in achieving its goals. Long, unread volumes of material serve few ends. Fortunately, the Council on Environmental Quality has been engaged in a long and detailed process to achieve greater efficiency and impact through the process. I urge that the Committee await and evaluate its next steps in accordance with the Council's report and actions.

I would like now to offer specific responses to several of the Committees recommendations.

1.1 Redefining "major federal action" is probably not possible in a way that is both objective and adaptive to the many and diverse types of federal actions that NEPA embraces. To say that such projects would require "substantial" planning simply shifts the same question to another adjective. Further, there are many actions that, while small in nature, have very large environmental consequences. Pulling the plug on a chain of wetlands, comes to mind, as does building a road into a roadless area. Any valid criteria of this nature have to include the determinative factor of impact itself, which is certainly what drove Congress in 1969.

1.2 Mandatory timelines are optimal, but a fixed number of days are better determined in a scooping process than by statute. Experience with similar deadlines in other environmental statutes (e.g. CWA, CAA, ESA, RCRA), is not good; they simply aren't met. To consider an uncompleted job "completed" simply compounds the confusion and fuels unwanted litigation. Better to establish an adaptive process than one-size-fits-all.

1.3 Categorical exclusions are indispensable. But they should not be allowed to ignore the cumulative impacts of individually-small proposals – which Congress specifically identified as a problem in 1969. The same could be said for "temporary" activities, which in real life often turn out to be long-term. Again, as with defining "major factual action", the focus should be on impacts.

1.4 NEPA supplements have proven to be very useful when circumstances change. They allow federal agencies to change. They open federal agencies to new information, which is often unwelcome and more often simply ignored. The Report's criteria for supplements are sound, but making them conjunctive eliminates the need for supplemental reviews even where the predicted impacts have radically changed. When what you are doing turns out to be unambiguously and unanticipatedly harmful, the fact that you decided to do it some years ago should not be controlling.

2.1 Giving weight to localized comments is routinely done. In many cases, the comment is exclusively local. On the other hand, to say that local comments should be "weighed more" is an invitation to confusion, disappointment by locals who thought they were given something close to a veto, and litigation (how much

"more "is" more?"). Further, the very fact that NEPA is federal and that federal resources and permits are involved implies that national interests should play an at least equal role. The history of resource management in the country is replete with local interests with no ill will, simply pursing their own interests, degrading national, public resources. See Hardin, The Tragedy of the Commons. See also the collapse of the New England fisheries. This proposal disrespects valid national interests, and will breed more discontent than it could ever alleviate.

3.2 This provision seems to repeal NEPA in any state that has a "similar" process. The reality is that NEPA is more than a state process; it involves federal agencies, federal resources and national public and private interests. The idea that they will be attended to in a state process ignores these national interests, and the federal safeguards of the NEPA process including for example EPA NEPA review and classification under the Clean Air Act, and the important role of the CEQ.

4.1 This provision both grants and then largely removes citizen enforcement of NEPA. It should be understood that citizen enforcement is all the enforcement there is in the NEPA program. No federal agency enforces it. CEQ can barely keep up with a few problem issues. The most ambiguous and troubling new requirement is that requiring plaintiffs to demonstrate that the "evaluation was not conducted using the best available information and science". What ever that means. When would such a demonstration be made? For standing? For the merits." If an agency flatly refuses to consider an available alternative, has it failed to use best available information and science? The purpose of this provision is elusive, particularly because NEPA itself contains no such best science/information standard. This one requires a second look.

The other odd aspect of this provision is the attempt to redefine standing itself, a subject that the Supreme Court has been tackling for decades. Again, the intent here is unclear. The basic standing case in all environmental law is Sierra Club v Morton. Is this an attempt to repeal that decision, or does the Committee agree with it? If the former, then the implications for all administrative law beyond NEPA are immense. This one too requires a second look.

5.1 This is perhaps the most puzzling recommendation in the Report. Requiring that alternatives would not have to be considered unless they were "supported by feasibility and engineering studies" puts the cart way ahead of the horse. Whose studies? When? May a highway department ignore an alternative route because it has not studied it? Isn't that very study and determination of feasibility the purpose of the NEPA process? Perhaps this recommendation goes not to the required consideration of the alternative, but to its adoption. If so, it makes more sense but is out of place here.

5.2 The puzzlement continues. An agency "would be require to reject" a no action alternative if its benefits do not outweigh its costs. Fair enuff. But does that also mean that the agency is required to accept this alternative if the benefits do

outweigh the costs? Again, the intent is unclear, but whatever is said should apply equally to both situations.

5.3 This mitigation requirement is positive, but is puzzling to the extent that it requires CEQ to draft regulations, rather than imposing the requirement through legislation. It would appear that the enforceability of mitigation, the only environmentally protective requirement of the Report, has mysteriously acquired second-class status. No reason comes to mind that distinguishes this very regulatory requirement from the other very regulatory requirements proposed by the Report as statutory law.

7.1. Mandating a NEPA "omsbudsman" within CEQ is something like mandating a CEQ within CEQ. This is what CEQ does. What is troubling, however, is the stated purpose to "offset the pressures put on agencies by stakeholders" so they can instead focus on the "consideration of environmental impacts." What world are we imagining here? NEPA is not an academic study process and it should not be a document production process. It is a process in which stakeholders contribute information and arrive at compromises over project proposals and impacts, leading to mitigation, modifications, and positive, substantive outcomes. Good NEPA processes have the stakeholders right there in the room. The proposal at hand relegates the expert agencies to document producers, and emasculates the process. Whatever is intended here will have adverse unintended consequences.

8.2 If the alternatives recommendations above are the most puzzling, the cumulative impact proposal here is the most unrealistic. Future cumulative impacts, foreseen and required by Congress in 1969, are not limited to "concrete proposed actions". No such impacts acted on in our personal lives are so limited either. Highway interchanges lead to rapid development around them. Every real estate agent in the country knows that. The development may not be a concrete proposal yet, but anyone who does not foresee that it will likely occur around the next off ramp is willfully blind (and missing a good investment opportunity). NEPA is intended to discourage – indeed prohibit – willful blindness. "Reasonably foreseeable" cumulative impacts must be on the table, or the table is a bit ridiculous.

I would like to close with another set of recommendations that do not appear in the Committee's Report. They are those submitted earlier by the more than 200 law professors earlier referenced, and incorporated by reference in these comments. None of those recommendations are even mentioned in the Report. Surely the accumulated experience represented in that document was not entirely without relevance or merit. A full and fair notice-and-comment proceeding would treat, if only out of courtesy, these recommendations. No one expects all of his or her recommendations to find favor in any forum. But one legitimately expects open consideration.

In this regard, one recommendation earlier made stands out as critical to the Committee's goal to streamline the process and make it more effective. NEPA has been relegated to dealing with small issues at the end of the decisionmaking train. It is

increasingly ignored in the large, planning decisions that determine future courses of action. The practical effect of this trend is to exclude sectors from the real decisionmaking, to aggravate controversy, and to focus that controversy on later, implementing actions that have much less flexibility to accommodate competing interests. Everyone loses. I will close by re-reccommending, then, that the Committee restore, through law or regulation, the NEPA process to planning decisions. This single act will serve to defuse controversy and achieve statutory goals at the only appropriate time: the beginning. As Senator Jackson and the Senate Committee explained in 1969, the purpose of the statute is to arrive at better solutions at a time when they are best capable of being achieved. That includes plans.

Thank you for the opportunity to present these views.

Respectfully submitted,

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